

## Administrative Office of the Courts

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#### MEMORANDUM

This memorandum lists the instructions the Tennessee Pattern Jury Instruction Committee (Criminal) changed or created after the 15<sup>th</sup> edition of the book was published in 2011. The Administrative Office of the Courts' website includes Word and WordPerfect "without comments and footnotes" versions of the instructions at issue. The "with comments and footnotes" version of newly-created instructions 10.05(d), 10.08(a), 10.23, 30.17(b), and 34.09 are attached to this memorandum.

#### 4.04 - Soliciting Minors to Engage in [Certain Conduct]

a. Renumber as 10.22.

#### 6.02 - Aggravated Assault

a. In Part A on page 62, delete the period at the end of element (2)(b), substitute a semi-colon, and add the following text after element (2)(b):

or

- (c) Only for offenses committed on or after 7/1/11: that the defendant attempted or intended to cause bodily injury to another by strangulation.
  - b. Following the term "attempted" in this new language, add a footnote with the following text: The trial judge may wish to charge Criminal Attempt in appropriate fact situations. See T.P.I. Crim. 4.01 (Criminal Attempt).
  - c. Add the following as a new definition in brackets immediately prior to the definition of "transportation system": ["Strangulation" means intentionally impeding normal breathing or circulation of the blood by applying pressure to the throat or neck or by blocking the nose and mouth of another person.]
  - d. Following the closing bracket of the definition of "strangulation" add a footnote with the following text: T.C.A. § 39-13-102(a)(2).
  - e. Delete Comment 1 and substitute the following:

Aggravated assault under subsection (d) is a Class A misdemeanor. Aggravated assault under subdivision (a)(1)(A) or subsection (b) or (c) is a Class C felony. Aggravated assault under subdivision (a)(1)(B) is a Class D felony. However, if an offense under subdivision (a)(1)(A) or (B) or subsection (c) is committed against a law enforcement officer, then the maximum fine shall be fifteen thousand dollars (\$15,000). T.C.A. \$39-13-102(e)(1).

f. Delete Comment 2 and renumber the remaining comments.

#### 6.03 - Reckless Endangerment

a. Following element three on page 70, add the following new text:

[and

- (4) Only for offenses committed on or after 1/1/12: that the defendant discharged a firearm into an [occupied] [unoccupied] habitation.]
  - b. Immediately following the existing definition of "Deadly Weapon" on page 70 insert the definition of "Firearm" in brackets. Insert the footnote outside the closing bracket. The definition and footnote can be found in TPI 36.09 on page 1092.
  - c. Immediately following the definition of "Firearm" insert the definition of "Habitation" in brackets. Insert the footnote outside the closing bracket. The definition and footnote can be found in TPI 14.01 on pages 515-16.
  - d. Immediately following the definition of "Habitation" insert the definition of "Occupied" in brackets. Insert the footnote outside the closing bracket. The definition and footnote can be found in TPI 14.01 on page 516.
  - e. Add the following text to the end of Comment One: Reckless endangerment by discharging a firearm into a habitation is a Class C felony, unless the habitation was unoccupied at the time of the offense, in which event it is a Class D felony. T.C.A. § 39-13-103(b)(3).

#### 7.01 - First Degree Murder - Premeditated (on or after 7/1/95)

a. In Comment 3 on page 95, delete "See State v. Chuncy Lesolue Hollis, No. W2009-02302-CCA-R3-CD (Tenn. Crim. App., filed Jan. 25, 2011, at Jackson)" and substitute "See State v. Hollis, 342 S.W.3d 43 (Tenn. Crim. App. 2011)."

#### 7.04(a) - First Degree Murder Punishment (on or after 7/1/95)

- Following aggravating circumstance 16 on page 108, add the following new text:
- [(17) The murder was committed at random and the reasons for the killing are not obvious or easily understood.] [Only for offenses committed on or after July 1, 2011]
- b. Add a footnote with the following text after the closing bracket of this new language: Tenn. Pub. Acts 2011, ch. 489, effective July 1, 2011.
- c. At the end of the second option under aggravating circumstance 14 on page 107, insert the following text after "on or after July 1, 1998" and inside the closing bracket: ", but prior to July 1, 2011."

## 7.04(b) - First Degree Murder Punishment (on or after 7/1/95)

- a. Following aggravating circumstance 16 on pages 123-24, add the following new text:
- [(17) The murder was committed at random and the reasons for the killing are not obvious or easily understood.] [Only for offenses committed on or after July 1, 2011]
- b. Add a footnote with the following text after the closing bracket of this new language: Tenn. Pub. Acts 2011, ch. 489, effective July 1, 2011.
- c. At the end of the second option under aggravating circumstance 14 on page 123, insert the following text after "on or after July 1, 1998" and inside the closing bracket: ", but prior to July 1, 2011."

#### 8.01 - Kidnapping

a. Add the following text between the "removal or confinement is 'unlawful'" paragraph and the paragraph which defines "bodily injury":

Although the law requires no specific period of time of confinement or distance of removal, (INSERT FOOTNOTE 3) a removal or confinement "interferes substantially" with another's liberty if the time of confinement is significant or the distance of removal is considerable. (INSERT FOOTNOTE 4)

[only include if another offense was committed during the alleged kidnapping, is charged in the indictment and is submitted to the jury: To find the defendant guilty of this offense, you must also find beyond a reasonable doubt that the removal or confinement was to a greater degree than that necessary to commit the offense(s) of \_\_\_\_\_\_ as charged [or included] in count(s) \_\_\_\_\_ . In making this determination, you may consider all the relevant facts and circumstances of the case, including, but not limited to, the following factors: (INSERT FOOTNOTE 5)

- (a) the nature and duration of the alleged victim's removal or confinement by the defendant;
- (b) whether the removal or confinement occurred during the commission of the separate offense;
- (c) whether the interference with the alleged victim's liberty was inherent in the nature of the separate offense:
- (d) whether the removal or confinement prevented the alleged victim from summoning assistance, although the defendant need not have succeeded in preventing the alleged victim from doing so;
- (e) whether the removal or confinement reduced the defendant's risk of detection, although the defendant need not have succeeded in this objective; and
- (f) whether the removal or confinement created a significant danger or increased the alleged victim's risk of harm independent of that posed by the separate offense.

Unless you find beyond a reasonable doubt that the alleged victim's removal or confinement exceeded that which was necessary to accomplish the alleged \_\_\_\_\_\_ and was not essentially incidental to it, you must find the defendant not guilty of [especially] [aggravated] [kidnapping] [false imprisonment].(INSERT FOOTNOTE 6)

b. When a reported citation becomes available, the new footnotes will cite to State v. Jason Lee White, No. M2009-00941-SC-R11-CD (Tenn., March 9, 2012).

#### 8.02 - Aggravated Kidnapping

a. Add the following text between the "removal or confinement is 'unlawful'" paragraph and the paragraph which defines "bodily injury":

Although the law requires no specific period of time of confinement or distance of removal, (INSERT FOOTNOTE 3) a removal or confinement "interferes substantially" with another's liberty if the time of confinement is significant or the distance of removal is considerable. (INSERT FOOTNOTE 4)

[only include if another offense was committed during the alleged kidnapping, is charged in the indictment and is submitted to the jury: To find the defendant guilty of this offense, you must also find beyond a reasonable doubt that the removal or confinement was to a greater degree than that necessary to commit the offense(s) of \_\_\_\_\_\_ as charged [or included] in count(s) \_\_\_\_\_\_. In making this determination, you may consider all the relevant facts and circumstances of the case, including, but not limited to, the following factors: (INSERT FOOTNOTE 5)

- (a) the nature and duration of the alleged victim's removal or confinement by the defendant;
- (b) whether the removal or confinement occurred during the commission of the separate offense:
- (c) whether the interference with the alleged victim's liberty was inherent in the nature of the separate offense;
- (d) whether the removal or confinement prevented the alleged victim from summoning assistance, although the defendant need not have succeeded in preventing the alleged victim from doing so;
- (e) whether the removal or confinement reduced the defendant's risk of detection, although the defendant need not have succeeded in this objective; and
- (f) whether the removal or confinement created a significant danger or increased the alleged victim's risk of harm independent of that posed by the separate offense.

Unless you find beyond a reasonable doubt that the alleged victim's removal or confinement exceeded that which was necessary to accomplish the alleged \_\_\_\_\_\_ and was not essentially incidental to it, you must find the defendant not guilty of [especially] [aggravated] [kidnapping] [false imprisonment].(INSERT FOOTNOTE 6)

b. When a reported citation becomes available, the new footnotes will cite to State v. Jason Lee White, No. M2009-00941-SC-R11-CD (Tenn., March 9, 2012).

#### 8.03 - Especially Aggravated Kidnapping

a. Add the following text between the "removal or confinement is 'unlawful'" paragraph and the paragraph which defines "deadly weapon":

Although the law requires no specific period of time of confinement or distance of removal, (INSERT FOOTNOTE 3) a removal or confinement "interferes substantially" with another's liberty if the time of confinement is significant or the distance of removal is considerable. (INSERT FOOTNOTE 4)

[only include if another offense was committed during the alleged kidnapping, is charged in the indictment and is submitted to the jury: To find the defendant guilty of this offense, you must also find beyond a reasonable doubt that the removal or confinement was to a greater degree than that necessary to commit the offense(s) of \_\_\_\_\_\_ as charged [or included] in count(s) \_\_\_\_\_\_. In making this determination, you may consider all the relevant facts and circumstances of the case, including, but not limited to, the following factors: (INSERT FOOTNOTE 5)

- (a) the nature and duration of the alleged victim's removal or confinement by the defendant;
- (b) whether the removal or confinement occurred during the commission of the separate offense;
- (c) whether the interference with the alleged victim's liberty was inherent in the nature of the separate offense;
- (d) whether the removal or confinement prevented the alleged victim from summoning assistance, although the defendant need not have succeeded in preventing the alleged victim from doing so;

- (e) whether the removal or confinement reduced the defendant's risk of detection, although the defendant need not have succeeded in this objective; and
- (f) whether the removal or confinement created a significant danger or increased the alleged victim's risk of harm independent of that posed by the separate offense.

Unless you find beyond a reasonable doubt that the alleged victim's removal or confinement exceeded that which was necessary to accomplish the alleged \_\_\_\_\_\_ and was not essentially incidental to it, you must find the defendant not guilty of [especially] [aggravated] [kidnapping] [false imprisonment].(INSERT FOOTNOTE 6)

b. When a reported citation becomes available, the new footnotes will cite to State v. Jason Lee White, No. M2009-00941-SC-R11-CD (Tenn., March 9, 2012).

#### 8.05 - False Imprisonment

a. Add the following text between the "removal or confinement is 'unlawful'" paragraph and the paragraph which defines "incompetent":

Although the law requires no specific period of time of confinement or distance of removal, (INSERT FOOTNOTE 3) a removal or confinement "interferes substantially" with another's liberty if the time of confinement is significant or the distance of removal is considerable. (INSERT FOOTNOTE 4)

[only include if another offense was committed during the alleged kidnapping, is charged in the indictment and is submitted to the jury: To find the defendant guilty of this offense, you must also find beyond a reasonable doubt that the removal or confinement was to a greater degree than that necessary to commit the offense(s) of \_\_\_\_\_\_ as charged [or included] in count(s) \_\_\_\_\_ . In making this determination, you may consider all the relevant facts and circumstances of the case, including, but not limited to, the following factors: (INSERT FOOTNOTE 5)

- (a) the nature and duration of the alleged victim's removal or confinement by the defendant;
- (b) whether the removal or confinement occurred during the commission of the separate offense;
- (c) whether the interference with the alleged victim's liberty was inherent in the nature of the separate offense;
- (d) whether the removal or confinement prevented the alleged victim from summoning assistance, although the defendant need not have succeeded in preventing the alleged victim from doing so;
- (e) whether the removal or confinement reduced the defendant's risk of detection, although the defendant need not have succeeded in this objective; and
- (f) whether the removal or confinement created a significant danger or increased the alleged victim's risk of harm independent of that posed by the separate offense.

Unless you find beyond a reasonable doubt that the alleged victim's removal or confinement exceeded that which was necessary to accomplish the alleged \_\_\_\_\_\_ and was not essentially incidental to it, you must find the defendant not guilty of [especially] [aggravated] [kidnapping] [false imprisonment].(INSERT FOOTNOTE 6)

b. When a reported citation becomes available, the new footnotes will cite to State v. Jason Lee White, No. M2009-00941-SC-R11-CD (Tenn., March 9, 2012).

#### 10.05(d) - Statutory Rape by an Authority Figure

a. New instruction

#### 10.08 - Promoting Prostitution

- a. In footnote 9 on page 270, delete T.C.A. § 39-13-512(5) and substitute T.C.A. § 39-13-512(6).
- b. In footnote 13 on page 270, delete T.C.A. § 39-13-512(6) and substitute T.C.A. § 39-13-512(7).

## 10.08(a) - Promoting Prostitution of a [Minor] [Person with an Intellectual Disability]

a. New instruction.

#### 10.09 - Prostitution

- a. In footnote 5 on page 273, delete T.C.A. § 39-13-512(5) and substitute T.C.A. § 39-13-512(6).
- b. In footnote 8 on page 274, delete T.C.A. § 39-13-512(6) and substitute T.C.A. § 39-13-512(7).

#### 10.10 - Patronizing Prostitution

a. In Parts A, B and C on pages 276-77, delete the bracket following the last element and insert the following new element (it will be element 3 for Part A and element 4 for Parts B and C):

[and

(insert element # here) Only for offenses committed on or after 6/1/11: that the person [was younger than eighteen (18) years of age] [had an intellectual disability].]]

- b. Add the following text to the end of Comment One: Patronizing prostitution from a person who is younger than eighteen (18) years of age or has an intellectual disability is a Class E felony. T.C.A. § 39-13-514(b)(4)(A).
- c. In footnote 5 on page 278, delete T.C.A. § 39-13-512(5) and substitute T.C.A. § 39-13-512(6).
- d. In footnote 8 on page 278, delete T.C.A. § 39-13-512(6) and substitute T.C.A. § 39-13-512(7).

#### 10.23 - Soliciting Sexual Exploitation of a Minor

a. New instruction

#### 21.05 - Distribution of Tobacco Products to Minor

a. In footnote 3, delete 39-17-1503(6) and substitute 39-17-1503(10).

#### 30.15 - Terrorism

- a. Add the following, in brackets, at the end of the instruction: [It is not a defense that the defendant felt justified in committing these acts for religious reasons.]
- b. After the closing bracket, add a footnote with the following text: T.C.A. § 39-13-809.

## 30.16 - Violation of Weapons of Mass Destruction Law

- a. Add the following, in brackets, after the definition of "recklessly" on page 867: [It is not a defense that the defendant felt justified in committing these acts for religious reasons.]
- b. After the closing bracket, add a footnote with the following text: T.C.A. § 39-13-809.

#### 30.17 - Providing Support or Resources for Terrorism

- a. Renumber as 30.17(a) and add "(for offenses committed prior to 7/1/11)" to the title of the instruction.
- b. Add the following, in brackets, after the definition of "recklessly" on page 870: [It is not a defense that the defendant felt justified in committing these acts for religious reasons.]
- c. After the closing bracket, add a footnote with the following text: T.C.A. § 39-13-809.

## 30.17(b) - Providing Support or Resources for Terrorism

a. New instruction

#### 30.18 – Distribution or Delivery of Substance as Act of Terrorism or Hoax

- a. Add the following, in brackets, at the end of the instruction: [It is not a defense that the defendant felt justified in committing these acts for religious reasons.]
- b. After the closing bracket, add a footnote with the following text: T.C.A. § 39-13-809.

#### 31.01 - Controlled Substances: Manufacture, Delivery or Sale

Delete the text of footnote 5 and substitute the following: "Controlled substance" means a drug, substance, or immediate precursor in Schedules I through VII of §§ 39-17-403 – 39-17-416.
 T.C.A. § 39-17-402(4).

#### 31.03 - Unlawful Drug Paraphernalia Uses and Activities

a. Delete the text of footnote 5 and substitute the following: "Controlled substance" means a drug, substance, or immediate precursor in Schedules I through VII of §§ 39-17-403 – 39-17-416.
 T.C.A. § 39-17-402(4).

#### 31.04 - Controlled Substances, etc.

- a. Immediately prior to the definition of "knowingly" on page 891, insert the inference which appears at the top of page 894 in 31.05. As in 31.05, when this language is inserted into 31.04 it should be in brackets and it should include the four footnotes.
- Between the last period and the closing bracket of this new text, add the following text: SEE COMMENT TWO.
- c. Add a new Comment Two with the following text:
  - 2. Even though casual exchange is not a lesser included offense of possession with intent to sell or deliver, *State v. Nelson*, 275 S.W.3d 851, 865 (Tenn. Crim. App. 2008) (citing *State v. Timothy Wayne Grimes*, No. M2001-01460-CCA- R3-CD, 2002 WL 31373472, at \*6 (Tenn. Crim. App. Oct. 16, 2002)), our courts have held that if there is evidence from which a jury could reasonably infer that there was an exchange, the inference must be charged. *Grimes*, at \*6.
- d. Delete the text of footnote 5 and substitute the following: "Controlled substance" means a drug, substance, or immediate precursor in Schedules I through VII of §§ 39-17-403 39-17-416. T.C.A. § 39-17-402(4).

#### 31.05 - Simple Possession or Casual Exchange

a. Delete the text of footnote 2 and substitute the following: "Controlled substance" means a drug, substance, or immediate precursor in Schedules I through VII of §§ 39-17-403 – 39-17-416. T.C.A. § 39-17-402(4).

## 31.12 - Unlawful Possession of Anhydrous Ammonia (prior to 3/30/05)

a. Delete the text of footnote 2 and substitute the following: "Controlled substance" means a drug, substance, or immediate precursor in Schedules I through VII of §§ 39-17-403 – 39-17-416. T.C.A. § 39-17-402(4).

#### 31.14 - Possession of Substance, etc. (on or after 7/1/04 but prior to 3/30/05)

a. Delete the text of footnote 2 and substitute the following: "Controlled substance" means a drug, substance, or immediate precursor in Schedules I through VII of §§ 39-17-403 – 39-17-416. T.C.A. § 39-17-402(4).

#### 31.16 - Use or Possession of False Drug Test Device

a. Delete the text of footnote 2 and substitute the following: "Controlled substance" means a drug, substance, or immediate precursor in Schedules I through VII of §§ 39-17-403 – 39-17-416.
 T.C.A. § 39-17-402(4).

#### 34.01 - Producing, Importing, etc. Obscene Material or Exhibition

a. In footnote 9, delete 39-17-901(2) and substitute 39-17-1002(1).

#### 34.02 - Using Minors to Import, etc. Obscene Material or Exhibition

- a. In footnote 10, delete 39-17-901(2) and substitute 39-17-1002(1).
- b. Add a new comment with the following text: If there is a question as to the meaning of "contemporary community standards," the trial judge may wish to refer to the case law on this topic set out in Comment 3 of T.P.I. Crim. 34.01.

#### 34.03(a) - Sexual Exploitation of a Minor (prior to 7/1/05)

- a. Delete elements 1 and 2 on page 991 and substitute the following:
- (1) that the defendant possessed material that includes a minor engaged in [sexual activity] [simulated sexual activity that was patently offensive];

and

- (2) that the defendant did so knowingly.
- b. In subsection (C) of the definition of "sexual activity" on page 993, substitute "contact" for "conduct" and delete the commas which appear around "or touching of".
- c. Following the definition of "community" on page 993, insert the definition, in brackets, of "simulated sexual activity" as it appears on page 1006. Insert the footnote as well, including the footnote citation change discussed in the summary for 34.05 below.
- d. Add a new comment with the following text: If there is a question as to the meaning of "contemporary community standards," the trial judge may wish to refer to the case law on this topic set out in Comment 3 of T.P.I. – Crim. 34.01.

#### 34.03(b) - Sexual Exploitation of a Minor (offenses on or after 7/1/05)

- a. In element 1 on page 994, delete "is patently offensive" and substitute "was patently offensive."
- b. In subsection (C) of the definition of "sexual activity" on page 996, substitute "contact" for "conduct" and delete the commas which appear around "or touching of".
- c. Following the definition of "community" on page 996, insert the definition, in brackets, of "simulated sexual activity" as it appears on page 1006. Insert the footnote as well, including the footnote citation change discussed in the summary for 34.05 below.
- d. Add a new comment with the following text: If there is a question as to the meaning of "contemporary community standards," the trial judge may wish to refer to the case law on this topic set out in Comment 3 of T.P.I. Crim. 34.01.

#### 34.04 - Agg Sexual Exploitation of a Minor

- a. Delete the elements of the offense on page 998 and substitute the following:
- (1) that the defendant did [promote] [sell] [distribute] [transport] [purchase] [exchange] [possess with the intent to promote, sell, distribute, transport, purchase or exchange] [obscene] material, which includes a minor engaged in [sexual activity] [simulated sexual activity that was patently offensive];

and

- (2) that the defendant did so knowingly.
- b. In subsection (C) of the definition of "sexual activity" on page 1001, substitute "contact" for "conduct" and delete the commas which appear around "or touching of".
- c. Add a new comment with the following text: If there is a question as to the meaning of "contemporary community standards," the trial judge may wish to refer to the case law on this topic set out in Comment 3 of T.P.I. Crim. 34.01.
- d. Following the definition of "community on page 999, insert the definition, in brackets, of "simulated sexual activity" as it appears on page 1006. Insert the footnote as well, including the footnote citation change discussed in the summary for 34.05 below.

#### 34.05 - Esp Agg Sexual Exploitation of Minor

- a. In subsection (C) of the definition of "sexual activity" on page 1005, substitute "contact" for "conduct" and delete the commas which appear around "or touching of".
- b. In the definition for "community" on page 1006, the first footnote is 11 and the second is 13 instead of 12. The footnote in the "simulated sexual activity/ultimate sexual acts" definition is then 12 and the footnote for the definition of "fellatio" is 13. These errors need to be corrected.
- c. Delete the text of the footnote which appears after the "simulated sexual activity/ultimate sexual acts" definition on page 1006 and substitute the following: T.C.A. § 39-17-901(14)(A).
- d. Delete the elements of this offense on page 1003 and substitute the following:
- (1) that the defendant did [promote] [employ] [use] [assist] [transport] [permit] a minor to participate in the [performance] [production] of material which includes the minor engaging in [sexual activity] [simulated sexual activity that was patently offensive];

and

(2) that the defendant did so knowingly.

e. Add a new comment with the following text: If there is a question as to the meaning of "contemporary community standards," the trial judge may wish to refer to the case law on this topic set out in Comment 3 of T.P.I. – Crim. 34.01.

#### 34.09 - Exploitation of a Minor [By Electronic Means]

a. New instruction

#### 36.02 - Carrying Weapons During Judicial Proceedings

a. Immediately prior to the last paragraph on page 1037, add the following new paragraph in brackets. Following the closing bracket, add a footnote with the following text: T.C.A. § 39-17-1306(c)(3).

[It is an exception to this offense that the defendant was in the actual discharge of official duties as a judge, was authorized to carry a handgun pursuant to § 39-17-1351, had successfully completed sixteen (16) hours of POST court security training, had successfully completed eight (8) hours of POST firearm training on an annual basis, and was vested with judicial powers under § 16-1-101.]

## 38.01(a) - DUI, etc. (prior to 1/1/11)

a. Add a Comment 3 with the following text:

In addition to other punishment, a first offender's driver's license shall be revoked for 1 year; for a second offense, 2 years; for a third offense, 3 to 10 years; for a fourth or subsequent offense, 5 years. T.C.A. § 55-10-403(a)(1)(A) (Supp. 2010).

#### 38.01(b) - DUI, etc. (on or after 1/1/11)

a. Add a new Comment 3 with the following text:

In addition to other punishment, a first offender's driver's license shall be revoked for 1 year; for a second offense, 2 years; for a third offense, 3 to 10 years if committed prior to 7/1/11 and 6 to 10 years if committed on or after 7/1/11; for a fourth or subsequent offense, 5 years if committed prior to 7/1/11 and 8 years if committed on or after 7/1/11. T.C.A. § 55-10-403(a)(1)(A).

#### 38.08 - DUI: Supp. Instruction Number One

a. Add a new Comment 2 with the following text:

In addition to other punishment, a first offender's driver's license shall be revoked for 1 year; for a second offense, 2 years; for a third offense, 3 to 10 years if committed prior to 7/1/11 and 6 to 10 years if committed on or after 7/1/11; for a fourth or subsequent offense, 5 years if committed prior to 7/1/11 and 8 years if committed on or after 7/1/11. T.C.A. § 55-10-403(a)(1)(A).

#### 40.06(b) - Defense: Self-Defense

a. At the top of page 1215, the word "character" should not be bolded.

## 42.04 - Credibility of Witness, etc.

a. Delete the text of footnote 2 and substitute the following: Lundy v. State, 752 S.W.2d 98, 103 (Tenn. Crim. App. 1987). See State v. Glebock, 616 S.W.2d 897, 906 (Tenn. Crim. App. 1981) (citing Cupp v. Naughton, 414 U.S. 141 (1973)).

## 42.04(b) - Alternative Instruction: Witness

a. Following the period at the end of the third full sentence in the first paragraph on page 1268 (this sentence ends in "has told the truth"), insert a footnote which has the following text: "Lundy v. State, 752 S.W.2d 98, 103 (Tenn. Crim. App. 1987). See State v. Glebock, 616 S.W.2d 897, 906 (Tenn. Crim. App. 1981) (citing Cupp v. Naughton, 414 U.S. 141 (1973)).

#### T.P.I. - CRIM. 10.05(d)

## STATUTORY RAPE BY AN AUTHORITY FIGURE

Any person who commits the offense of statutory rape by an authority figure is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant had unlawful sexual penetration of the alleged victim or the alleged victim had unlawful sexual penetration of the defendant;

and

that the victim was at least thirteen (13) years of age but less than eighteen (18) years of age;

and

- (3) that the defendant was at least four (4) years older than the victim; and
- (4)(a) that the defendant was, at the time of the alleged unlawful sexual penetration, in a position of trust, and used such position of trust to accomplish the sexual penetration;

or

(b) that the defendant had, at the time of the alleged unlawful sexual penetration, [supervisory] [disciplinary] power over the victim by virtue of the defendant's [legal] [professional] [occupational] status, and used such power to accomplish the sexual penetration; (c) that the defendant had, at the time of the alleged unlawful sexual contact, 
[parental] [custodial] authority over the victim and used such authority to 
accomplish the sexual penetration;

and

(5) that the defendant acted either intentionally, knowingly or recklessly.<sup>2</sup>

"Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the alleged victim's, the defendant's, or any other person's body, but emission of semen is not required.<sup>3</sup>

["Cunnilingus" means a sex act accomplished by placing the mouth or tongue on or in the vagina of another.]<sup>4</sup>

["Disciplinary power" means the power to demand obedience through the use or threat of punishment.]<sup>5</sup>

["Fellatio" means a sex act accomplished with the male sex organ and the mouth or lips of another. Intrusion into the alleged victim's mouth is not required.]<sup>6</sup>

["Supervisory power" means the power to direct the actions of another.]

"Victim" means the person alleged to have been subjected to criminal sexual conduct.<sup>8</sup>

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.<sup>9</sup>

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.10

"Recklessly" means that a person acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of, but consciously disregards, a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint. 11

#### COMMENTS

- 1. Statutory rape by an authority figure is a Class C felony. T.C.A. § 39-13-532(b).
- 2. Although the definitions section, T.C.A. § 39-13-501, enacted in 1989, limited the definitions contained therein to offenses set out in T.C.A. § 39-13-501 to T.C.A. § 39-13-511, the Committee feels that when the offense of statutory rape by an authority figure was created by the legislature in 2006 it was their intent that those definitions apply to this offense as well.
- 3. A violation of T.C.A. § 39-15-401, child abuse and child neglect, may be a lesser included offense of statutory rape by an authority figure. T.C.A. § 39-15-401(f).

<sup>&</sup>lt;sup>1</sup> T.C.A. § 39-13-532.

<sup>&</sup>lt;sup>2</sup> T.C.A. § 39-11-301(c) and accompanying Sentencing Commission Comment. <sup>3</sup> T.C.A. § 39-13-501(7). See Comment 2.

<sup>&</sup>lt;sup>4</sup> This definition is derived from former T.P.I. – Crim. 9.04, Crimes against nature.

<sup>&</sup>lt;sup>5</sup> State v. Denton, 149 S.W.3d 1, 18-19 (Tenn. 2004).

<sup>&</sup>lt;sup>6</sup> State v. Marcum, 109 S.W.3d 300, 303-04 (Tenn. 2003).

<sup>&</sup>lt;sup>7</sup> State v. Denton, 149 S.W.3d 1, 19 (Tenn. 2004).

<sup>&</sup>lt;sup>8</sup> T.C.A. § 39-13-501(8). See Comment 2.

<sup>&</sup>lt;sup>9</sup> T.C.A. § 39-11-106(a)(18).

<sup>&</sup>lt;sup>10</sup> T.C.A. § 39-11-106(a)(20).

<sup>&</sup>lt;sup>11</sup> T.C.A. § 39-11-106(a)(31).

## T.P.I. -- CRIM. 10.08(a)

# PROMOTING PROSTITUTION OF A [MINOR] [PERSON WITH AN INTELLECTUAL DISABILITY]

Any person who commits the offense of promoting prostitution is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:<sup>1</sup>

[Part A:

(1) that the defendant [owned] [controlled] [managed] [supervised] [kept],

[alone] [in association with others] [a business for the purpose of engaging
in prostitution] [a house of prostitution];

and

that the defendant did so when one (1) or more of the persons engaged in prostitution [was less than eighteen (18) years of age] [had an intellectual disability];

and

(3) that the defendant acted either intentionally, knowingly or recklessly.<sup>2</sup>]

or

## [Part B:

(1) that the defendant procured an inmate for a house of prostitution;

and

that the defendant did so when one (1) or more of the persons engaged in prostitution [was less than eighteen (18) years of age] [had an intellectual disability];

(3) that the defendant acted either intentionally, knowingly or recklessly.<sup>3</sup>] or

[Part C:

(1) that the defendant encouraged, induced or purposely caused another to become a prostitute;

and

that the defendant did so when one (1) or more of the persons engaged in prostitution [was less than eighteen (18) years of age] [had an intellectual disability];

and

(3) that the defendant acted either intentionally, knowingly or recklessly.<sup>4</sup>]

or

[Part D:

(1) that the defendant solicited a person to patronize a prostitute;

and

that the defendant did so when one (1) or more of the persons engaged in prostitution [was less than eighteen (18) years of age] [had an intellectual disability];

and

(3) that the defendant acted either intentionally, knowingly or recklessly.<sup>5</sup>]

or

[Part E:

(1) that the defendant procured a prostitute for a patron;

and

that the defendant did so when one (1) or more of the persons engaged in prostitution [was less than eighteen (18) years of age] [had an intellectual disability];

and

(3) that the defendant acted either intentionally, knowingly or recklessly.<sup>6</sup>]

or

## [Part F:

(1) that the defendant [solicited] [received] [agreed to receive] a benefit for engaging in the activity of (list activities defined in § 39-13-512(4));<sup>7</sup>

and

that the defendant did so when one (1) or more of the persons engaged in prostitution [was less than eighteen (18) years of age] [had an intellectual disability];

#### and

(3) that the defendant acted either intentionally, knowingly or recklessly.<sup>8</sup>]

"Prostitution" means engaging in, or offering to engage in, sexual activity as a business or being an inmate in a house of prostitution or loitering in a public place for the purpose of being hired to engage in sexual activity.<sup>9</sup>

"House of prostitution" means any place where prostitution or the promotion of prostitution is regularly carried on by one or more person(s) under the control, management or supervision of another.<sup>10</sup>

"Inmate" means a person who engages in prostitution in or through the agency of a house of prostitution.<sup>11</sup>

"Patronizing prostitution" means soliciting or hiring another person with the intent that the other person engage in prostitution, or entering or remaining in a house of prostitution for the purpose of engaging in sexual activity.<sup>12</sup>

"Sexual activity" means any sexual relations including homosexual sexual relations.<sup>13</sup>

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.<sup>14</sup>

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.<sup>15</sup>

"Recklessly" means that a person acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of, but consciously disregards, a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.<sup>16</sup>

#### COMMENTS

- 1. Promoting prostitution of a minor or a person with an intellectual disability is a Class E felony. T.C.A. § 39-13-515.
- 2. If the definition of an offense within Title 39 does not plainly dispense with a mental element, intent, knowledge or recklessness suffices to establish the culpable mental state. T.C.A. § 39-11-301(c). The Committee is of the opinion that the definitions of "intentionally," "knowingly," and "recklessly" should all be charged for this offense.

<sup>&</sup>lt;sup>1</sup> T.C.A. § 39-13-515 and T.C.A. § 39-13-512(4) and (5).

<sup>&</sup>lt;sup>2</sup> T.C.A. § 39-11-301(b) and T.C.A. § 39-11-301(c) and accompanying Sentencing Commission Comment.

<sup>&</sup>lt;sup>3</sup> T.C.A. § 39-11-301(b) and T.C.A. § 39-11-301(c) and accompanying Sentencing Commission Comment.

<sup>&</sup>lt;sup>4</sup> T.C.A. § 39-11-301(b) and T.C.A. § 39-11-301(c) and accompanying Sentencing Commission Comment.

<sup>&</sup>lt;sup>5</sup> T.C.A. § 39-11-301(b) and T.C.A. § 39-11-301(c) and accompanying Sentencing Commission Comment.

<sup>&</sup>lt;sup>6</sup> T.C.A. § 39-11-301(b) and T.C.A. § 39-11-301(c) and accompanying Sentencing Commission Comment.

<sup>&</sup>lt;sup>7</sup> List any activities defined in T.C.A. § 39-13-512(4)(A) to T.C.A. § 39-13-512(4)(F).

<sup>&</sup>lt;sup>8</sup> T.C.A. § 39-11-301(b) and T.C.A. §39-11-301(c) and accompanying Sentencing Commission Comment.

<sup>&</sup>lt;sup>9</sup> T.C.A. § 39-13-512(6).

<sup>&</sup>lt;sup>10</sup> T.C.A. § 39-13-512(1).

<sup>&</sup>lt;sup>11</sup> T.C.A. § 39-13-512(2).

<sup>&</sup>lt;sup>12</sup> T.C.A. § 39-13-512(3).

<sup>&</sup>lt;sup>13</sup> T.C.A. § 39-13-512(7).

<sup>&</sup>lt;sup>14</sup> T.C.A. § 39-11-106(a)(18).

<sup>&</sup>lt;sup>15</sup> T.C.A. § 39-11-106(a)(20).

<sup>&</sup>lt;sup>16</sup> T.C.A. § 39-11-106(a)(31).

#### T.P.I. - CRIM. 10.23

## SOLICITING SEXUAL EXPLOITATION OF A MINOR

Any person who commits the offense of soliciting sexual exploitation of a minor is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:<sup>1</sup>

(1) that the defendant was eighteen (18) years of age or older;

and

that the defendant, by means of [[oral] [written] [electronic]

communication] [electronic mail] [Internet service] [webcam

communications], directly or through another intentionally [commanded]

[hired] [persuaded] [induced] [caused] a minor to engage in [sexual

activity] [simulated sexual activity that was patently offensive];

and

(3) that the [simulated] sexual activity was observed by the defendant or another.

"Minor" means any person under eighteen (18) years of age.2

"Patently offensive" means that which goes substantially beyond customary limits of candor in describing or representing such matters.<sup>3</sup>

"Sexual activity" means any of the following acts:

- (A) vaginal, anal or oral intercourse, whether done with another person or an animal;
- (B) masturbation, whether done alone or with another human or an animal;

- (C) patently offensive, as determined by contemporary community standards, physical contact with or touching of a person's clothed or unclothed genitals, pubic area, buttocks or breasts in an act of apparent sexual stimulation or sexual abuse;
- (D) sadomasochistic abuse, including flagellation, torture, physical restraint, domination or subordination by or upon a person for the purpose of sexual gratification of any person;
- (E) the insertion of any part of a person's body or of any object into another person's anus or vagina, except when done as a part of a recognized medical procedure by a licensed professional;
- (F) patently offensive, as determined by contemporary community standards, conduct, representations, depictions or descriptions of excretory functions;

or

(G) lascivious exhibition of the female breast or the genitals, buttocks, anus or pubic or rectal area of any person.<sup>4</sup>

["Community" means the judicial district, (describe judicial district),<sup>5</sup> in which a violation is alleged to have occurred.]<sup>6</sup>

["Lascivious" means tending to excite lust; lewd; indecent.]

[A "simulated sexual activity" depicts explicit sexual activity which gives the appearance of ultimate sexual acts, anal, oral or genital. "Ultimate sexual acts" means sexual intercourse, anal or otherwise, fellatio, cunnilingus or sodomy.]<sup>8</sup>

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.9

#### COMMENTS

- 1. Soliciting sexual exploitation of a minor is a Class B felony. T.C.A. § 39-13-529(f). A person is subject to prosecution for this offense for any conduct that originates in this state, or for any conduct that originates by a person located outside this state, where the conduct involved a minor located in this state or the solicitation of a law enforcement officer posing as a minor located in this state. T.C.A. § 39-13-529(d).
- 2. If there is a question as to the meaning of "contemporary community standards," the trial judge may wish to refer to the case law on this topic set out in Comment 3 of T.P.I. - Crim. 34.01.

<sup>&</sup>lt;sup>1</sup> T.C.A. § 39-13-529(a).

<sup>&</sup>lt;sup>2</sup> T.C.A. § 39-11-106(a)(23).

<sup>&</sup>lt;sup>3</sup> T.C.A. § 39-13-529(e)(3).

<sup>&</sup>lt;sup>4</sup> T.C.A. § 39-13-529(e)(4).

<sup>&</sup>lt;sup>5</sup> T.C.A. § 16-2-506.

<sup>&</sup>lt;sup>6</sup> T.C.A. § 39-13-529(e)(1). <sup>7</sup> Black's Law Dictionary (8<sup>th</sup> Ed. 2004).

<sup>&</sup>lt;sup>8</sup> T.C.A. § 39-17-901(14)(A).

<sup>&</sup>lt;sup>9</sup> T.C.A. § 39-11-106(a)(18).

## T.P.I. - CRIM. 30.17(b)

## (for offenses committed on or after 7/1/11)

## PROVIDING SUPPORT OR RESOURCES FOR TERRORISM

Any person who [conspires to provide] [provides] material support or resources for terrorism is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:<sup>1</sup>

## [Part A:

(1) that the defendant [attempted² to provide] [conspired³ to provide] [provided] material support or resources to any person;

and

(2)(a) that the defendant knew that person was [planning] [carrying out] an act of terrorism in Tennessee;

or

(2)(b) that the defendant knew that person was [concealing] [attempting to escape after committing or attempting<sup>4</sup> to commit] an act of terrorism;

and

(3) that the defendant acted either intentionally, knowingly or recklessly.<sup>5</sup>]

or

[Part B:

- (1) that the defendant [attempted<sup>6</sup> to provide] [conspired<sup>7</sup> to provide] [provided] material support or resources to any designated entity; and
- that the defendant had actual knowledge that the entity was a designated entity;

and

(3) that the defendant acted either intentionally, knowingly or recklessly.<sup>8</sup>]

The essential elements necessary to constitute an act of terrorism are (here set out the relevant portions of T.P.I. – CRIM. 30.15).

["Designated entity" means any entity designated by the United States department of state as a foreign terrorist organization in accordance with § 219 of the Immigration and Nationality Act, codified in 8 U.S.C. § 1189, or by the United States department of the treasury as a specially designated national in accordance with 31 CFR part 500.]<sup>9</sup>

"Material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, transportation, and personnel, except medicine or religious materials.<sup>10</sup> "Expert advice or assistance" means advice or assistance derived from scientific, technical, legal or other specialized knowledge, except legal services provided to a defendant in relation to any action brought pursuant to this part, or pursuant to federal or state law.<sup>11</sup> "Training"

means instruction or teaching designed to impart a specific skill, as opposed to general knowledge.<sup>12</sup>

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.<sup>13</sup>

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.<sup>14</sup>

"Recklessly" means that a person acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of, but consciously disregards, a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.<sup>15</sup>

[It is not a defense that the defendant felt justified in committing these acts for religious reasons.]<sup>16</sup>

[It is a defense to prosecution for this offense that the material support or resources provided were any financial service, funds transfer, or securities transaction conducted in the ordinary course of business by a financial institution subject to the information sharing, suspicious activity reporting, or currency transaction reporting requirements of the Bank Secrecy Act (31 U.S.C. § 5311 et

seq.), or the U.S.A. Patriot Act (PL 107-56); provided, however, that it is not a defense available to any such institution that acts with the intent to assist, aid, or abet any person planning or carrying out an act of terrorism in Tennessee, or concealing or attempting to escape after committing or attempting to commit an act of terrorism. "Financial institution" shall have the meaning provided in 31 CFR chapter X.<sup>17</sup>]<sup>18</sup>

#### COMMENTS

1. Providing support or resources for terrorism is a Class A felony.

<sup>&</sup>lt;sup>1</sup> T.C.A. § 39-13-807(a).

<sup>&</sup>lt;sup>2</sup> The trial judge may wish to charge Criminal Attempt in appropriate fact situations. See T.P.I. – Crim. 4.01 (Criminal Attempt).

<sup>&</sup>lt;sup>3</sup> The trial judge may wish to charge Conspiracy in appropriate fact situations. See T.P.I. – Crim. 4.03 (Criminal Conspiracy).

<sup>&</sup>lt;sup>4</sup> The trial judge may wish to charge Criminal Attempt in appropriate fact situations. See T.P.I. – Crim. 4.01 (Criminal Attempt).

<sup>&</sup>lt;sup>5</sup> T.C.A. § 39-11-301(c) and accompanying Sentencing Commission Comment.

<sup>&</sup>lt;sup>6</sup> The trial judge may wish to charge Criminal Attempt in appropriate fact situations. See T.P.L. – Crim. 4.01 (Criminal Attempt).

<sup>&</sup>lt;sup>7</sup> The trial judge may wish to charge Conspiracy in appropriate fact situations. See T.P.I. – Crim. 4.03 (Criminal Conspiracy).

<sup>&</sup>lt;sup>8</sup> T.C.A. § 39-11-301(c) and accompanying Sentencing Commission Comment.

<sup>&</sup>lt;sup>9</sup> T.C.A. § 39-13-803(4).

<sup>&</sup>lt;sup>10</sup> T.C.A. § 39-13-803(7).

<sup>&</sup>lt;sup>11</sup> T.C.A. § 39-13-803(5).

<sup>&</sup>lt;sup>12</sup> T.C.A. § 39-13-803(9).

<sup>&</sup>lt;sup>13</sup> T.C.A. § 39-11-106(a)(18).

<sup>&</sup>lt;sup>14</sup> T.C.A. § 39-11-106(a)(20).

<sup>&</sup>lt;sup>15</sup> T.C.A. § 39-11-106(a)(31).

<sup>&</sup>lt;sup>16</sup> T.C.A. § 39-13-809.

<sup>&</sup>lt;sup>17</sup> T.C.A. § 39-13-803(6).

<sup>&</sup>lt;sup>18</sup> T.C.A. § 39-13-807(c).

#### T.P.I. - CRIM. 34.09

## **EXPLOITATION OF A MINOR [BY ELECTRONIC MEANS]**

Any person who commits the offense of exploitation of a minor [by electronic means] is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:<sup>1</sup>
[PART A:

(1) that the defendant was eighteen (18) years of age or older;

and

(2) that the defendant [directly] [by means of [electronic communication]

[electronic mail] [Internet service] [webcam communications]], engaged in

[sexual activity] [simulated sexual activity that was patently offensive];

and

that this activity was for the purpose of having a minor view the [simulated] sexual activity [in the presence of the defendant] [by means of [electronic communication] [electronic mail] [Internet service] [webcam communications]];

and

(4) that the defendant acted intentionally.]

or

## [PART B:

(1) that the defendant was eighteen (18) years of age or older;

and

(2) that the defendant [directly] [by means of [electronic communication]

[electronic mail] [Internet service] [webcam communications]], [displayed to a minor] [exposed a minor to] any material containing [sexual activity]

[simulated sexual activity that was patently offensive];

and

(3) that the purpose of the display could reasonably be construed as being for the sexual arousal or gratification of the minor or the defendant displaying the material;

and

(4) that the defendant acted intentionally.]

or

## [PART C:

(1) that the defendant was eighteen (18) years of age or older;

and

(2) that the defendant [directly] [by means of [electronic communication]

[electronic mail] [Internet service] [webcam communications]], displayed to
a law enforcement officer posing as a minor any material containing

[sexual activity] [simulated sexual activity that was patently offensive];

and

(3) that the defendant reasonably believed the law enforcement officer to be less than eighteen (18) years of age;

and

(4) that the purpose of the display could reasonably be construed as being for the sexual arousal or gratification of the intended minor or the defendant displaying the material;

and

(5) that the defendant acted intentionally.

["Law enforcement officer" means an officer, employee or agent of government who has a duty imposed by law to:

(A) maintain public order;

or

(B) make arrests for offenses, whether that duty extends to all offenses or is limited to specific offenses;

and

- (C) investigate the commission or suspected commission of offenses.]<sup>2</sup> ["Material" means:
- (A) Any picture, drawing, photograph, undeveloped film or film negative,
   motion picture film, videocassette tape or other pictorial representation;
- (B) Any statue, figure, theatrical production or electrical reproduction;
- (C) Any image stored on a computer hard drive, a computer disk of any type,or any other medium designed to store information for later retrieval;

or

(D) Any image transmitted to a computer or other electronic media or video screen, by telephone line, cable, satellite transmission, or other method

that is capable of further transmission, manipulation, storage or accessing, even if not stored or saved at the time of transmission.]<sup>3</sup>

"Minor" means any person under eighteen (18) years of age.4

"Patently offensive" means that which goes substantially beyond customary limits of candor in describing or representing such matters.<sup>5</sup>

"Sexual activity" means any of the following acts:

- (A) vaginal, anal or oral intercourse, whether done with another person or an animal;
- (B) masturbation, whether done alone or with another human or an animal;
- (C) patently offensive, as determined by contemporary community standards, physical contact with or touching of a person's clothed or unclothed genitals, pubic area, buttocks or breasts in an act of apparent sexual stimulation or sexual abuse;
- (D) sadomasochistic abuse, including flagellation, torture, physical restraint, domination or subordination by or upon a person for the purpose of sexual gratification of any person;
- (E) the insertion of any part of a person's body or of any object into another person's anus or vagina, except when done as a part of a recognized medical procedure by a licensed professional;
- (F) patently offensive, as determined by contemporary community standards, conduct, representations, depictions or descriptions of excretory functions;

lascivious exhibition of the female breast or the genitals, buttocks, anus or (G) pubic or rectal area of any person.6

I"Community" means the judicial district, (describe judicial district), in which a violation is alleged to have occurred.18

["Lascivious" means tending to excite lust; lewd; indecent.]9

[A "simulated sexual activity" depicts explicit sexual activity which gives the appearance of ultimate sexual acts, anal, oral or genital. "Ultimate sexual acts" means sexual intercourse, anal or otherwise, fellatio, cunnilingus or sodomy.]<sup>10</sup>

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result. 11

#### COMMENTS

- 1. Exploitation of a minor [by electronic means] is a Class E felony. If the child is less than thirteen (13) years of age, it is a Class C felony. T.C.A. § 39-13-529(f). A person is subject to prosecution for this offense for any conduct that originates in this state, or for any conduct that originates by a person located outside this state, where the conduct involved a minor located in this state or the solicitation of a law enforcement officer posing as a minor located in this state. T.C.A. § 39-13-529(d).
- 2. If there is a question as to the meaning of "contemporary community standards," the trial judge may wish to refer to the case law on this topic set out in Comment 3 of T.P.I. -Crim. 34.01.

<sup>&</sup>lt;sup>1</sup> T.C.A. § 39-13-529(b).

<sup>&</sup>lt;sup>2</sup> T.C.A. § 39-11-106(a)(21).

<sup>&</sup>lt;sup>3</sup> T.C.A. § 39-13-529(e)(2).

<sup>&</sup>lt;sup>4</sup> T.C.A. § 39-11-106(a)(23).

<sup>&</sup>lt;sup>5</sup> T.C.A. § 39-13-529(e)(3).

<sup>&</sup>lt;sup>6</sup> T.C.A. § 39-13-529(e)(4).

<sup>&</sup>lt;sup>7</sup> T.C.A. § 16-2-506.

<sup>&</sup>lt;sup>8</sup> T.C.A. § 39-13-529(e)(1). <sup>9</sup> *Black's Law Dictionary* (8<sup>th</sup> Ed. 2004).

<sup>&</sup>lt;sup>10</sup> T.C.A. § 39-17-901(14)(A). <sup>11</sup> T.C.A. § 39-11-106(a)(18).